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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re J. B. et al., Persons Coming Under the  
Juvenile Court Law.

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LOS ANGELES COUNTY DEPARTMENT  
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

A. B.,

Defendant and Appellant.

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B204476

(Los Angeles County  
Super. Ct. No. CK67759)

APPEAL from orders of the Superior Court of Los Angeles County,  
Stanley Genser, Referee. Affirmed in part and reversed in part.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County  
Counsel and O. Raquel Ramirez, Associate County Counsel, for Plaintiff and  
Respondent.

Roni Keller for Minors.

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## INTRODUCTION

The juvenile court found that two children were persons within the meaning of Welfare and Institutions Code section 300, subdivisions (b) and (j).<sup>1</sup> The court also entered a dispositional order declaring the children dependents of the court and removing them from their father's physical custody. We affirm the jurisdictional order under section 300, subdivision (b) but reverse it under section 300, subdivision (j). We also reverse the dispositional order.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. *Appellant's Family*

Beginning in approximately 2004, appellant A. B. (father) lived with his daughter E. V. (older daughter), his daughter J. B. (younger daughter), his son A. B., Jr. (son), his sister L. B. (aunt), and aunt's minor son. Father is the biological father of older daughter, younger daughter and son. In early 2007, prior to the commencement of this action, older daughter, younger daughter, and son were 17, 14 and 12 years old, respectively.

Older daughter has a different mother than her two half-siblings. The whereabouts of older daughter's mother is unknown. Older daughter began living with father when she was 10.

T. B. (mother), the mother of younger daughter and son, lost custody of the children to father while she was incarcerated. Younger daughter and son stopped living with mother in 1995. Mother, however, visited the children every other weekend and on Wednesdays.

### 2. *The First Action*

In about June 2006, older daughter ran away from home. Older daughter reported to respondent Los Angeles Department of Children and Family Services (DCFS or Department) that she had been physically and sexually abused by father. DCFS placed older daughter in a group home. In December 2006, DCFS filed a dependency petition in Los Angeles Superior Court (First Action). In its petition, DCFS alleged that the juvenile

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<sup>1</sup> All subsequent section references are to the Welfare and Institutions Code.

court had jurisdiction under section 300, subdivision (d), on the following grounds: “On prior occasions, the child [older daughter]’s father [A. B.] sexually abused the child by laying on top of the child and by moving his body against the child’s body in a sexual manner. Further, the child’s father frequently massaged the child, causing the child to feel uncomfortable, sexually threatened and afraid. . . .” DCFS also alleged that the juvenile court had jurisdiction under section 300, subdivisions (a), (b), and (i), because father physically abused older daughter.

At trial, older daughter claimed that when she was in sixth grade, father began sexually abusing her by giving her “massages.” Father lay on top of older daughter while they were both clothed and moved his body around in a sexual manner. This abuse, older daughter alleged, occurred on and off until she was in eighth grade. She also claimed that when she was in 10th grade, father pulled up her shirt and fondled and suckled her breasts. Older daughter further claimed that father physically abused her by grabbing her by the neck, forcefully striking her arms, and pulling her hair.

In interviews with DCFS and at trial, father, younger daughter, son, and aunt denied that father sexually or physically abused older daughter or his other children. Younger daughter and father also stated that older daughter ran away from home because father punished her for disobedience, truancy and lying, and because he prohibited her from dating a 24-year-old man.

On March 12, 2007, the juvenile court sustained DCFS’s petition, and declared older daughter a dependent child of the court. At the hearing, however, the court expressed doubts about older daughter’s allegations regarding father touching her breasts, and made no finding with respect to that alleged incident. On March 15, 2007, older daughter turned 18 years old. On May 16, 2007, the juvenile court terminated jurisdiction over older daughter.

On January 16, 2008, in Case No. B197597, Division 4 of this court affirmed the juvenile court’s March 12, 2007 rulings.<sup>2</sup> The court stated in its opinion that the appeal

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<sup>2</sup> We take judicial notice of this opinion and the record on appeal in the First Action.

was not moot even though older daughter turned 18, because “[t]he outcome of this case could affect how a court may view a future case brought by the Department.”

3. *The Detention of Younger Daughter and Son and the Commencement of This Action*

In the meantime, on March 2, 2007, DCFS contacted father in response to an emergency response referral with respect to younger daughter and son. Father voluntarily left the residence where aunt and his children lived so that the children could remain with aunt.

DCFS again interviewed father, younger daughter, son and aunt on several occasions. Each of these witnesses repeatedly denied that father abused any of his children. Younger daughter and son both stated that they wanted to live with father and that they felt safe with him.

On April 16, 2007, DCFS filed a dependency petition with respect to younger daughter and son. On that same date, the court ordered that younger daughter and son be detained with aunt. Father was allowed monitored visits with the children at aunt’s home.

Subsequently, the children were placed with mother. However, after mother failed to appear at several court-ordered drug tests, younger daughter and son were placed back with aunt.

4. *The First Amended Petition*

In June 2007, DCFS filed a first amended petition, wherein it alleged that the juvenile court had jurisdiction under section 300, subdivision (b)<sup>3</sup>, on the following grounds: “The children’s mother, [T. B.], was unable to comply with court orders of drug testing . . . . Mother’s conduct places the children’s physical and emotional health and safety at risk of harm.”

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<sup>3</sup> Section 300, subdivision (b), provides that the juvenile court has jurisdiction over a child who comes within the following description: “The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . .”

DCFS also alleged that the juvenile court had jurisdiction under section 300, subdivision (j).<sup>4</sup> The Department set forth two subdivision (j) counts. In the first, it alleged that father “sexually abused the children’s sibling [older daughter] in that father lay on top of the children’s sibling and moved the father’s body against the children’s sibling in a sexual manner. Such sexual abuse of the children’s sibling on the part of the father endangers the children’s physical and emotional health, safety and well being, creates a detrimental home environment and places the children at risk of physical and emotional harm, damage and sexual abuse.”

In the second count, DCFS alleged that father abused older daughter by grabbing her neck, forcefully striking her arms, and pulling her hair. “Such physical abuse of the children’s sibling by the father,” DCFS alleged, “endangers the children’s physical and emotional health, safety and well being, creates a detrimental home environment and places the children at risk of physical and emotional harm, damage and physical abuse.”

##### 5. *The Jurisdictional and Dispositional Orders*

On October 18, 2007, the juvenile court held a hearing on DCFS’s first amended petition. Father testified that beginning in or about January 2007 he started sexual abuse boundaries and anger management counseling pursuant to court orders in the First Action. He stopped taking the classes, however, when the First Action was dismissed. But in about September 2007, father began taking similar classes in anticipation of being required to do so by the court in this action. Father further testified that he was willing to abide by any court orders.

Dependency investigator Aida Delgadillo testified that based on her investigation, she did not believe older daughter’s allegations in the First Action, even though they were found true by the court. Ms. Delgadillo placed particular emphasis on younger daughter’s and son’s statements. She testified: “[Younger daughter] is already 15, she

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<sup>4</sup> Section 300, subdivision (j), provides that the juvenile court has jurisdiction over a child who comes within the following description: “The child’s sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions.”

can speak for herself. She can say – she can express her feelings, her fears. And [son] can express . . . his fears and everything. He’s not a baby anymore. They can say if they’re in danger.” Mr. Delgadillo further testified: “The father is very, very well behaved, very respectful. I don’t see anything wrong.” Ms. Delgadillo, however, admitted that she did not interview older daughter. At that point, the court stated: “I don’t need to hear any more from you.”

DCFS argued that the court should assert jurisdiction but did not oppose allowing father to continue to reside with aunt and the children. Mother opposed allowing father to reside with the children. The children’s counsel stated: “The children feel that they would not be at risk if father was returned to the home. Social worker testified about the bonding that exists between the children. There are significant number of people in the paternal aunt’s home. . . . [¶] My recommendation, if the court is inclined to return the children – to allow the father to reside in that home, father not have any unmonitored contact with the children, that the paternal aunt insure that the father is never left alone with the children at any time.”

The juvenile court sustained the petition and declared younger daughter and son dependent children of the court pursuant to section 300, subdivisions (b) and (j). In reaching its decision, the court stated: “It’s res judicata as to whether or not the [section 300, subdivision] (d) allegation<sup>5</sup> [in the First Action] was true as to a sibling, who, apparently, was molested, if the allegations are true, and I have to accept them as true. I can’t go beyond that. Who are now – who was at – at the same age that these children are now. And, clearly, this worker [Ms. Delgadillo], by her own admission, does not believe those allegations are true, and therefore [Ms. Delgadillo’s recommendation is] colored. . . . So I’m faced here with that recommendation based upon the worker’s bias over the prior findings.”

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<sup>5</sup> Section 300, subdivision (d), provides that the juvenile court has jurisdiction over a child who comes within the following description: “The child has been sexually abused, or there is a substantial risk that the child will be sexually abused . . . by his or her parent . . . .”

The juvenile court ordered that younger daughter and son be removed from father's physical custody pursuant to section 361, subdivision (b). The court found that there was clear and convincing evidence that (1) substantial danger existed to the physical health of the children; (2) the children were suffering severe emotional damage; and (3) there was no other reasonable means to protect the children without removal from father's physical custody. The court ordered that the children continue to live with aunt but prohibited father from residing in aunt's home. Father filed a timely appeal from the juvenile court's October 18, 2008 rulings.

## **DISCUSSION**

### *1. The Juvenile Court Had Jurisdiction Over the Children*

The juvenile court found that it had jurisdiction over younger daughter and son pursuant to section 300, subdivisions (b) and (j). The court's subdivision (j) finding related to father's conduct while the court's subdivision (b) finding related to mother's conduct. Our standard of review is whether substantial evidence in the record supports these findings. (*In re James C.* (2002) 104 Cal.App.4th 470, 482.) We find that there was not substantial evidence to support the court's subdivision (j) finding, but there was substantial evidence to support the court's subdivision (b) finding.

#### *a. The Court Did Not Have Jurisdiction Under Section 300, Subdivision (j)*

Contrary to father's contention, for jurisdictional purposes, he was barred under the doctrine of collateral estoppel (issue preclusion) from disputing the juvenile court's finding in the First Action that he sexually or physically abused older daughter, as alleged in the dependency petition in the First Action.<sup>6</sup> "A party is collaterally estopped from relitigating an issue previously adjudicated if: (1) the issue necessarily decided in the

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<sup>6</sup> DCFS contends that father is also barred from disputing the sexual and physical abuse findings under the doctrine of "res judicata." Res judicata is sometimes used by the courts to refer to both claim preclusion and issue preclusion or, alternatively, claim preclusion only. Father is not barred under claim preclusion because he did not assert a "claim" in the First Action. Rather, he simply denied the jurisdictional allegations in DCFS's petition. (See *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1326-1332.)

previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the estoppel is asserted was a party, or in privity with a party, to the previous suit.” (*In re Joshua J.* (1995) 39 Cal.App.4th 984, 993.) All three elements are present here. Whether older daughter was sexually or physically abused by father was hotly contested and necessarily decided in the First Action. These are precisely the issues father wishes to relitigate in this case. The March 12, 2007, order in the First Action was a final judgment on the merits against father. (See *In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1704 [“an order at the conclusion of the dispositional hearing adjudicating the minor a dependent child of the court is a final judgment. . . . [A]ny subsequent order is appealable as an order after judgment”].) Therefore, at the jurisdictional hearing, father was collaterally estopped from relitigating the issues of whether he sexually or physically abused older daughter.

Father’s reliance on *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738 (*Blanca P.*) is misplaced. In *Blanca P.*, the issue was whether an initial sexual abuse finding by a juvenile court barred the court from reconsidering the finding *in the same action*. Collateral estoppel, however, only bars the relitigation of issues decided in a “previous suit.” (*In re Joshua J., supra*, 39 Cal.App.4th at p. 993; see also *People v. Memro* (1995) 11 Cal.4th 786, 821 [“It is questionable whether the doctrine of collateral estoppel even applies to further proceedings in the same litigation”]; *Cherry v. Superior Court* (2001) 86 Cal.App.4th 1296, 1305, 1306 (conc. opn. of Epstein, J.)[“there is no basis for operation of the collateral estoppel principle since this litigation involves separate phases of the same case, not a different case”].) In the present case, in contrast to *Blanca P.*, father is barred by the adjudication of issues in a previous action.

Furthermore, *Blanca P.* involved extraordinary facts. For example, in *Blanca P.*, the judge who made the initial determination of abuse “did not even realize until the hearing began that it was about *whether* the father had molested his daughter—the judge went into the hearing assuming that the father had already been found guilty of the sexual abuse of a child.” (*In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1039-1040, fn. 11,

citing *Blanca P.*, *supra*, 45 Cal.App.4th at pp. 1744-1745.) No similar circumstances exist here.

For purposes of determining the juvenile court's jurisdiction, we must accept as true the finding in the First Action that father sexually abused older daughter when she was in the sixth, seventh and eighth grades, a time period which was several years prior to the October 18, 2007 jurisdictional/dispositional hearing. We must also accept as true the allegations of father's physical abuse of older daughter. But that is not the end of our analysis. The juvenile court may assert jurisdiction under section 300, subdivision (j) if, and only if, the child's sibling has been sexually and physically abused, "and there is a substantial risk that the child *will be* abused . . . ." (Italics added.)

"While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) Thus the past infliction of abuse, standing alone, does not establish substantial risk of future abuse. (*Ibid.*)

DCFS argues that there was a substantial risk that father would sexually molest younger daughter and son because they were each at the age older daughter was when she was molested by father, and because father had not completed the sexual abuse and other counseling ordered in the First Action.<sup>7</sup> Father, however, only stopped attending counseling sessions after the First Action was dismissed. Further, father voluntarily resumed counseling even before being ordered to do so.

With respect to the age of younger daughter and the age of son, we find such facts less than substantial, especially because there is not a scintilla of evidence that father had ever sexually molested *these children*. Younger daughter and son, moreover, were old enough for the court to seriously consider their assessment of the likelihood that father

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<sup>7</sup> DCFS also argues that merely because son is of a different gender than older daughter does not, by itself, mean that son was not at substantial risk of sexual abuse. We agree. (*In re Karen R.* (2001) 95 Cal.App.4th 84, 89-91.)

poses a danger to them. They both repeatedly and adamantly denied that father had or would sexually molest them.

It is also worth noting that by the time of the October 18, 2007 dispositional hearing, there was no allegation of continuing sexual or physical abuse of older daughter. By then, older daughter had moved out of the family home and father's alleged sexual abuse of older daughter ended approximately four years earlier.

We find that at the time of the October 18, 2007 hearing, there was not substantial evidence to support a finding that there was a substantial risk that father would sexually molest or physically abuse younger daughter and son in the future. The juvenile court thus did not have jurisdiction over younger daughter and son under section 300, subdivision (j).

b. *The Court Had Jurisdiction Under Section 300, Subdivision (b)*

An appellate court can affirm a juvenile court's finding of jurisdiction if the evidence supports the finding on any one of the enumerated statutory bases which, if supported by the evidence, can suffice to establish jurisdiction. (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875-76; *In re Dirk S.* (1993) 14 Cal.App.4th 1037, 1045; *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 72.) Here, father does not present any arguments regarding the court's section 300, subdivision (b) finding. This finding related to mother's conduct, not father's conduct. However, "a jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent." (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.) Accordingly, we find no grounds to reverse the juvenile court assertion of jurisdiction under section 300, subdivision (b).

2. *The Juvenile Court Should Not Have Applied the Doctrine of Collateral Estoppel In Determining Whether To Remove the Children From Father's Physical Custody*

"Allegations of child molestation are *serious*; they merit more than a rubber stamp. With the exception of death penalty cases, it is hard to imagine an area of the law where there is a greater need for reliable findings by the trier of fact. The consequences

of being wrong—*on either side*—are too great.” (*Blanca P.*, *supra*, 45 Cal.App.4th at p. 1754.) Accordingly, “substantive justice is best served in sexual abuse cases when the common law doctrine of collateral estoppel is applied narrowly.” (*In re Jessica C.*, *supra*, 93 Cal.App.4th at p. 1039, fn. 11.)

In *In re Nathaniel P.* (1989) 211 Cal.App.3d 660, the juvenile court found at a jurisdictional hearing that the father had sexually and physically abused his children. (*Id.* at p. 664.) Subsequently, the Department of Social Services (DSS) sought to terminate the father’s parental rights under former Civil Code section 232, subdivision (a)(7). The Court of Appeal held that it was error for the juvenile court “to conclude that collateral estoppel barred the father from producing evidence he had not sexually or physically abused his children since DSS previously had prevailed on that issue only under the lesser standard of preponderance of the evidence. The father is entitled in the termination proceeding to have the issue redetermined under the standard of clear and convincing evidence.” (*Id.* at p. 672.)

The reasoning of *In re Nathaniel P.* applies to this case. DCFS prevailed at the jurisdictional hearing in the First Action on the issues of sexual and physical abuse under the standard of preponderance of evidence. To remove younger daughter and son from father’s physical custody, however, DCFS must prevail under the higher clear and convincing evidence standard. (§ 361, subd. (c).) The juvenile court therefore incorrectly assumed that it was barred from considering the issues of whether older daughter was sexually or physically abused by father *for the purpose of determining whether the physical custody of younger daughter and son can be taken away from father.*

## **DISPOSITION**

The jurisdictional finding of the juvenile court that younger daughter and son are persons within the meaning of section 300, subdivisions (b) is affirmed. Although we find that the juvenile court did not have jurisdiction under section 300, subdivision (j), our finding does not divest the juvenile court of jurisdiction over the children.

The juvenile court's dispositional order is reversed. At any hearing regarding whether the children should be taken from the physical custody of father, the juvenile court may not find that father is collaterally estopped from arguing that he did not sexually or physically abuse older daughter.

## **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.